

DALE B. GOLDFARB, State Bar No. 65955  
KEVIN P. McNAMARA, State Bar No. 180690  
HARRINGTON, FOXX, DUBROW & CANTER, LLP  
1055 West Seventh Street, 29<sup>th</sup> Floor  
Los Angeles, California 90017-2547  
Telephone (213) 489-3222  
Facsimile (213) 623-7929

Attorneys for Defendant, CLARENDON  
AMERICA INSURANCE COMPANY  
erroneously sued herein as Clarendon  
American Insurance Company

**UNITED STATES DISTRICT COURT**  
**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

LEGACY PARTNERS, INC, a  
Delaware corporation,

Plaintiff,

v.

CLARENDON AMERICAN  
INSURANCE COMPANY, and  
DOES 5 through 10,

Defendants.

CASE NO. CV0920BTMCAB

The Hon. Barry Ted Moskowitz

Action Filed: December 7, 2007

**REPLY MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT OF  
CLARENDON AMERICA INSURANCE  
COMPANY'S MOTION TO DISMISS**

**Date: July 18, 2008**  
**Time: 11:00 a.m.**  
**Room: 5**

///

///

///

///

///

///

///

///

///

///

**MEMORANDUM OF POINTS AND AUTHORITIES**

**1. INTRODUCTION.**

Plaintiff's Opposition demonstrates that plaintiff has elected to employ the shotgun method in opposing Clarendon America Insurance Company's ("Clarendon") Motion to Dismiss. However, scrutiny reveals even the shotgun approach misses the mark in this case. Plaintiff repeatedly suggests that the mere allegation of negligence means there must be an occurrence. That is not the law. To exacerbate this misfire, plaintiff repeatedly references allegations of its alleged negligent conduct that do not relate to "property damage" or "personal injury."

Plaintiff also makes much ado about the absence of analysis in Clarendon's moving papers regarding the "personal injury" coverage in the policy. This is because there simply is no coverage available to plaintiff under this portion of the policy relative to the underlying suit. That this is obvious is revealed below. That Clarendon did not address every conceivable coverage afforded under its policy in its moving papers is no impediment to this Court granting its Motion to Dismiss given the ease with which the court can conclude the personal injury coverage is not implicated.

Plaintiff's arguments of waiver and estoppel are unavailing. The allegations in the Complaint do not support a conclusion that Clarendon forfeited its right to deny coverage under either of these theories.

Finally, because Clarendon did not breach the insurance contract, it could not have breached the covenant of good faith and fair dealing implied into it.

Clarendon therefore respectfully urges the Court to grant its Motion to Dismiss. Since the absence of coverage for these claims is clear from the pleadings before the Court, Clarendon urges the Court to do so without leave to amend.

///

///

///

2. **THERE IS NO COVERAGE UNDER THE PERSONAL INJURY  
PORTION OF THE POLICY.**

While plaintiff makes much noise of the absence of argument in Clarendon's moving papers regarding the personal injury coverage afforded in Clarendon's policy, closer scrutiny reveals even plaintiff recognizes the invalidity of this argument. The substance of plaintiff's argument can be found under heading 5, at pages 19-20. Plaintiff merely states that ". . . Wellington sought damages against Legacy for negligent trespass and nuisance, for the alleged wrongful entry onto its premises."

As noted in plaintiff's Opposition, the pertinent portion of the definition of personal injury is:

"Wrongful entry into, or eviction of a person from, or invasion of the right of private occupancy of a room, dwelling or premises that the person occupies with the permission of or on behalf of its owner, landlord or lessor."  
[emphasis added]

The California Court of Appeal recently held in Mirpad, LLC v. California Insurance Guaranty Association (2005) 132 Cal.App.4th 1058 that the word "person" in this definition necessarily refers to a natural person, not an organization. More recently, the Mirpad decision was followed in Stonelite Tile, Inc. v. California Insurance Guaranty Association (2007) 150 Cal.App.4th 19, where the court noted:

"The [Mirpad] court concluded that because the policy used the words 'person' and 'organization' separately and distinctly, those words had to be accorded their separate and distinct meanings and held that the word 'person' as used in the context of the wrongful eviction offense refers only to natural persons. [citation omitted] Consequently, Stonelite's nuisance and trespass claims would not be covered under the

///

1 personal injury liability portion of the policy.” [emphasis  
2 added.]

3 Here, Plaintiff was sued in the underlying action by a non-natural person. Thus,  
4 there is no coverage available to plaintiff under the personal injury portion of the  
5 policy.

6 Additionally, plaintiff did not “occupy” the property as contemplated in the  
7 policy, as required to implicate personal injury coverage. Plaintiff concedes the  
8 property was undeveloped. The Court held in Stein-Brief Group, Inc. v. Home  
9 Indemnity Co. (1998) 65 Cal.App.4th 364, 373 that personal injury coverage was not  
10 triggered when the alleged transgressions occurred while the property was in the pre-  
11 construction stage. The Court concluded there was no “wrongful entry of eviction”  
12 since “such language connotes disruptions of the ability of a land owner to actually  
13 occupy his property, not mere injuries to property. [citation]” (Titan Corp. v. Aetna  
14 Casualty & Surety Co. (1994) 22 Cal.App.4th 457, 476 [27 Cal.Rptr.2d 476].) Since  
15 plaintiff’s property was likewise in the pre-construction stage, plaintiff did not  
16 “occupy” the property and the personal injury coverage is not triggered.

17 As such, this provides an independent basis upon which the Court may conclude  
18 there is no potential coverage under the personal injury portion of the policy.

19  
20 **3. THERE WAS NO WAIVER OR ESTOPPEL.**

21 Waiver requires the intentional relinquishment of a known right. Waller v. Truck  
22 Insurance Exchange, Inc. (1995) 11 Cal.4th 1. There are no allegations in the  
23 Complaint that Clarendon intentionally waived a known right. First, the Complaint  
24 does not actually allege that Clarendon accepted Legacy’s tender of defense. Instead,  
25 the Complaint alleges that “. . . Legacy confirmed that it is Clarendon’s ‘intent’ to  
26 accept the tender of defense of this matter subject to a reservation of rights.” [emphasis  
27 added] Complaint paragraph 20. Second, plaintiff’s own allegations reference  
28 Clarendon’s reservation of rights, which necessarily defeats any argument of waiver.

1 The Complaint then alleges at paragraph 22 that six weeks later Clarendon denied  
 2 coverage. These allegations are simply insufficient to support a determination that  
 3 Clarendon intentionally waived a known right. Plaintiff's allegations relate to  
 4 plaintiff's conduct, not Clarendon's. To the extent they relate to Clarendon's conduct,  
 5 they reveal a reservation of rights.

6 Similarly, these allegations are insufficient to support a determination of  
 7 equitable estoppel. Plaintiff adds paragraph 21 to this mix, in which it alleges it  
 8 forwarded to Clarendon "attorney-client privilege building invoices from defense  
 9 counsel. Legacy also kept Clarendon apprised of upcoming mediations from  
 10 Wellington." How this supports a determination of equitable estoppel is a mystery.  
 11 Paragraph 15 of the Complaint reveals that Legacy was sued on or about October 28,  
 12 2004, that Wellington filed a First Amended Complaint on or about May 17, 2005, and  
 13 a Second Amended Complaint (SAC) on or about August 15, 2005. Paragraph 19 of  
 14 the Complaint reveals that plaintiff first "notified" Clarendon of the underlying lawsuit  
 15 on July 9, 2005, more than nine months after the original Complaint was filed.  
 16 Estoppel may be found only where, by words or conduct, the insurer has caused the  
 17 insured reasonably to change its position to its detriment. Chase v. Blue Cross of  
 18 California (1996) 42 Cal.App.4th 1142, 1151. There are no allegations in the  
 19 Complaint that establish detrimental reliance. Further, plaintiff's allegations that  
 20 Clarendon reserved its rights defeats any argument of reasonable detrimental reliance.

21 Plaintiff's citation to the California Insurance Regulations does nothing to bolster  
 22 its arguments for waiver or estoppel. First, a purported violation of the insurance  
 23 regulations does not give rise to an actionable tort. Moradi-Shalal v. Fireman's Fund  
 24 Insurance Co. (1988) 46 Cal.3d 287, 304. Indeed, plaintiff cites to no case law to  
 25 support its argument that this alleged violation somehow supports a finding of waiver  
 26 or estoppel. Plaintiff's attempt to do an end run around the California Supreme Court's  
 27 holding in Moradi-Shalal fails and must not be countenanced.

28 Neither waiver nor estoppel applies in this case.

1 **4. THERE WAS NO “OCCURRENCE”.**

2 Plaintiff repeatedly argues that the mere allegation of negligent conduct suffices  
 3 to support a determination that there was an “occurrence.” This argument has been  
 4 repeatedly rejected. Uhrich v. State Farm Fire & Casualty Company (2003) 109  
 5 Cal.App.4th 598, 610. The question is whether plaintiff was sued in the underlying  
 6 case for accidentally causing property damage. Plaintiff’s Opposition not only  
 7 erroneously argues a parallel between negligence and an occurrence or accident, but  
 8 cites to allegations of Legacy’s alleged failure to exercise reasonable care and skill, but  
 9 without tying these allegations to alleged resultant property damage. Whether plaintiff  
 10 engaged in accidental conduct, that did not cause covered property damage is irrelevant.  
 11 What matters is whether plaintiff engaged in accidental conduct that caused covered  
 12 property damage. Legacy also goes outside the pleadings in its Opposition in a last  
 13 ditch effort to avoid dismissal.

14 The underlying SAC, attached to and incorporated into plaintiff’s Complaint,  
 15 alleges plaintiff intentionally constructed subterranean tie-backs using Wellington’s  
 16 property without permission (SAC, paragraph 37) and “. . . entered the Wellington  
 17 property to remove much of the storm and pollution work which Wellington has  
 18 completed as part of the pre-development phase for the project.” (SAC, paragraph 39)  
 19 Plaintiff was sued in the underlying action because it engaged in intentional conduct.  
 20 Indeed, Wellington’s allegations that plaintiff intentionally went around Wellington,  
 21 to Caltrans, in order to do what Wellington refused to allow it to do were at the very  
 22 core of Wellington’s suit against Legacy. Wellington alleged, inter alia, Legacy  
 23 intentionally entered its property, intentionally used heavy duty equipment on  
 24 Wellington’s property, and intentionally removed storm and pollution work.

25 Plaintiff’s reliance upon the recent decision of Lyons v. Fire Insurance Exchange  
 26 (2008) 161 Cal.App.4th 880 is misplaced. The Lyons court concluded :

27 ///

28 ///

“Here, however, Lyons asserts merely his mistaken subjective belief about another person’s consent. The best that can be said by Lyons is that he labored under the misimpression that Roy would not rebuff his advances and would consent to his overtures. However, his mental miscalculation of her state of mind simply cannot transform his intentional conduct, done with full knowledge of all the objective facts, into an accident.”

In reaching this conclusion, the court noted:

“‘Under California law, the term [‘accident’] refers to *the nature of the insured’s conduct, not his state of mind.*’ [citation.] ‘Negligent’ or not, in this case the insured’s conduct alleged to have given rise to claimant’s injuries is necessarily non-accidental, not because any ‘harm’ was intended, but simply because the conduct could not be engaged in by ‘accident.’” (*Quon, supra* 67 Cal.App.4th at page 596, 79 Cal.Rptr.2d 134, italics added.) Thus, mistaken consent does not, as a matter of law, create an accident. (See also *Merced Mutual Insurance Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50-51, 261 Cal.Rptr. 273.)” [emphasis in original]

Thus, plaintiff’s arguments that it was sued for accidental conduct because it believed it was operating within the scope of the encroachment permit from Caltrans miss the mark. Further, plaintiff’s argument that Wellington did not allege Legacy intended to cause damage to its property is both inconsistent with the underlying SAC, and irrelevant. Wellington alleged plaintiff intentionally entered its property, and caused damage. That Wellington did not expressly allege that plaintiff intended to cause each and every type of damage referenced in the Complaint is of no import. It



1 is plaintiff's burden to establish entitlement to any coverage under the policy. Aiden  
 2 Corp. v. First State Insurance Co. (1998) 18 Cal.4th 1183. Indeed, there is no  
 3 allegation in the SAC that Legacy did not intend to cause all of the alleged damage.

4 Plaintiff's citation to State Farm Fire & Casualty Co. v. Superior Court (June 26,  
 5 2998) — Cal.App.4th — , 2008 WL 2524668, likewise is not helpful to plaintiff. In  
 6 State Farm, the court concluded there was an accident, and thus an occurrence, because

7 "Although he deliberately picked Wright up and threw him  
 8 at the pool, Lint did not intend or expect the consequence,  
 9 namely, that Wright would land on a step. . . . It is  
 10 undisputed that Lint did not intend to hurt Wright; he merely  
 11 intended that Wright land farther out into the water and 'get  
 12 . . . wet.' . . . Stated otherwise, the act directly responsible for  
 13 Wright's injury, throwing too softly so as to miss the water,  
 14 was an unforeseen or undesigned happening or consequence  
 15 and was thus fortuitous." [Italics and citation omitted]

16 Here, plaintiff does not and cannot identify an analogous allegation in the SAC,  
 17 or underlying discovery responses, that would support a finding of an accident.  
 18 Wellington alleged plaintiff intentionally placed heavy construction equipment and  
 19 materials on the Wellington property, intentionally removed storm and pollution work  
 20 that Wellington had completed, and intentionally constructed subterranean tie-backs  
 21 beneath Wellington's property. The State Farm case involved testimony from the  
 22 insured that he did not intend to cause injury. There is no corresponding testimony in  
 23 this case that Legacy did not intend to engage in any of the at-issue conduct or resulting  
 24 consequences. There is likewise no allegation by Wellington, or evidence that Legacy  
 25 did not intend any of the consequences of its actions.

26 The inescapable conclusion is that there was no occurrence and thus no coverage  
 27 obligation under Clarendon's policy.

28 While unnecessary for ruling upon the instant motion, Clarendon notes for the



record that under no circumstances would Clarendon have owed a duty to defend Legacy in the underlying case. Legacy's extensive citation to duty defend cases is thus misleading to the court. Plaintiff bears the burden of establishing that the allegations in the underlying action were such to trigger Clarendon's duty to reimburse defense costs, or duty to indemnify. Plaintiff has not and cannot meet that burden. Clarendon's Motion should, therefore, be granted, without leave to amend.

**5. THERE WAS NO BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.**

As set forth in Clarendon's moving papers, California law supports the conclusion that there can be no breach of the implied covenant of good faith and fair dealing when there is no breach of the insurance contract. As set forth above and in Clarendon's moving papers, there was no breach of contract and thus there was no breach of the implied covenant of good faith and fair dealing.

Plaintiff's purported citations to the contrary miss the mark. In Guebara v. Allstate Insurance Co. (9<sup>th</sup> Circuit 2001) 237 F.3d 987, the court found there was no bad faith. Not only is plaintiff's suggestion that the "court specifically noted that there are many situations where a bad faith claim can exist without coverage" at best a creative characterization, which Clarendon frankly thinks is inaccurate, it is at best dicta since the court affirmed the trial court's grant of summary judgment on the bad faith cause of action. The same is true as respects plaintiff's citation to Adams v. Allstate Insurance Co. (C.D. Cal. 2002) 187 F.Supp.2d 1219. In that case the court likewise granted the insurer's summary judgment motion on a bad faith cause of action. Any suggestion by the District Court under what circumstances a bad faith claim may exist even absent coverage is likewise dicta. Similarly, plaintiff cites to Murray v. State Farm Fire & Casualty Co. (1990) 219 Cal.App.3d. 58, 65-66 where the court noted:

"Having properly found in favor of State Farm on the

1 contract causes of action, the trial court correctly granted  
 2 summary judgment as to the tort and statutory causes of  
 3 action as well.”

4 The court then noted, in dicta, that there may be unusual circumstances in which  
 5 an insurance company could be liable to its insured for tortious bad faith despite the  
 6 fact that the insurance contract did not provide for coverage, such as an unreasonable  
 7 delay in performing an investigation of a claim with the insured suffering consequential  
 8 loss as a result of the delay. Not only is that comment dicta, there are no similar  
 9 allegations in this particular case.

10 Further, all of these dicta cases are true first party cases. None of them involve  
 11 an underlying third party lawsuit. They are thus wholly distinguishable on this ground.  
 12 Plaintiff cites to no third party cases where the court found the plaintiff able to state a  
 13 cause of action for breach of the implied covenant of good faith and fair dealing where  
 14 the insurer properly denied defense (or reimbursement of defense costs) and indemnity.

15  
 16 As such, Clarendon’s Motion to Dismiss the Second Cause of Action in the  
 17 Complaint should likewise be granted.

## 18 19 **6. CONCLUSION.**

20 Wellington sued Legacy in the underlying action because Legacy engaged in a  
 21 series of intentional conduct which Wellington alleged caused it harm. Most of the  
 22 harm alleged by Wellington falls outside the definition of “property damage” in  
 23 Clarendon’s policy. Because there was no accident, there was no occurrence as defined  
 24 in Clarendon’s policy and California law, and Clarendon’s coverage obligations were  
 25 not triggered.

26 Similarly, the allegations in the underlying action triggered no coverage  
 27 obligation under the “personal injury” portion of the policy.

28 Nothing in the Complaint supports a contrary conclusion. Nothing in the

1 Complaint supports a determination that Clarendon waived, or is estopped from  
2 asserting its right to deny coverage to Wellington.

3 Because there was no breach of contract, there could be no breach of the implied  
4 covenant of good faith and fair dealing.

5 Clarendon thus respectfully urges the court to grant its motion to dismiss, in its  
6 entirety. Because it is clear amendment would be fruitless, the court should grant  
7 Clarendon's motion without leave to amend.

8  
9  
10 DATED: July 11, 2008

Respectfully submitted,

11 HARRINGTON, FOXX, DUBROW &  
12 CANTER, LLP

13 By: /s/ Kevin P. McNamara  
14 KEVIN P. McNAMARA  
15 Attorneys for Defendant,  
16 CLARENDON AMERICA INSURANCE  
17 COMPANY  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

HARRINGTON, FOXX, DUBROW & CANTER, LLP  
1055 WEST SEVENTH STREET, 29<sup>TH</sup> FLOOR  
LOS ANGELES, CALIFORNIA 90017-2547  
TELEPHONE (213) 489-3222

**PROOF OF SERVICE**

**(Re: Legacy Partners v. Clarendon)**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1055 West Seventh Street, 29<sup>th</sup> Floor, Los Angeles, California 90017-2547.

On **July 11, 2008**, I caused to be served the foregoing document described as **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CLARENDON AMERICA INSURANCE COMPANY'S MOTION TO DISMISS** on all interested parties in this action as follows:

Susan Page White, Esq. - [whites@dicksteinshapiro.com](mailto:whites@dicksteinshapiro.com)

Dickstein Shapiro LLP - [bossd@dicksteinshapiro.com](mailto:bossd@dicksteinshapiro.com)

**[X] VIA ELECTRONIC MAIL** - all parties listed above have been served via electronic mail through the court's CM/ECF system, which automatically generates a Notice of Electronic Filing (NEF) allowing registered e-filers to retrieve the document.

Executed on **July 11, 2008**, at Los Angeles, California.

**X** (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

/s/ Kevin P. McNamara  
KEVIN P. McNAMARA